Turning the Microscope on Ourselves: Self-Assessment by Bankruptcy Lawyers of Potential Conflicts of Interest in Columbus, Ohio

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Studying the theoretical underpinnings of how lawyers should behave is useful in its own way, but studying how lawyers actually behave adds an important overlay to issues of professional responsibility. In this Article, Professor Rapoport examines the issue of multiple representation of clients in the commercial bankruptcy context. She details the results of her survey of Columbus bankruptcy practitioners in terms of how often those lawyers identified potential conflicts of interest that might prevent simultaneous representation of more than one client in a particular bankruptcy case. Professor Rapoport also discusses her study of the docket sheets of 163 bankruptcy cases filed in Columbus, which was designed to determine how often multiple representation issues were raised in court. After reviewing what can be gleaned as conclusions from these two databases, she discusses better ways to approach the empirical research of this issue in future studies.

I. INTRODUCTION

In a 1994 article, I addressed the problems facing lawyers who have been asked to represent more than one party in interest in a single bankruptcy case.[1]

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Finally, I'd like to comment that this piece was written during a "personal best" sweep of stress: the admissions recruiting season, deadlines for a symposium, and my wedding all converged during the fall of 1996—many thanks to my husband, parents, colleagues, and friends for preventing my spontaneous combustion during this period.

[1] Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913 (1994).

The crux of that article concerned the side-switching problem that bedevils most bankruptcy conflicts checks. In any given bankruptcy case, the parties are likely to align and realign themselves with other parties in interest several times, depending on the particular issues raised and the particular positions taken by the parties with respect to those issues.[2] Because each new alignment depends on decisions made when other issues were pending, potential conflicts of interest are often difficult to isolate at the time when the decision to represent a client is the most important when the case begins.[3]

For some representations, such as the debtor-in-possession, the trustee, or the creditors' committee (the "official entities"), the bankruptcy court must approve the representation in advance.[4] For these representations, court approval provides a "gatekeeping" function. Although the court cannot, at the beginning of a case, rule on all of the conflicts that *might* evolve during the case, the nature of the approval process invites at least a cursory initial examination of potential conflicts of interest.[5] For counsel representing other parties in interest, such as creditors or parties interested in purchasing assets from the estate ("third-party purchasers"), the only gatekeeping mechanism is the lawyer's own awareness of the likelihood that potential conflicts may turn into actual conflicts.

Although there are numerous articles discussing the ethical implications of representing official entities while representing other parties in interest in the

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[2] For example, all of the unsecured creditors may oppose a cash collateral agreement between a secured creditor and the debtor, fearing that the secured creditor will "lock up" all of the remaining available assets of the estate. Later, some of those same unsecured creditors may side with a secured creditor as to the appointment of a trustee based on debtor mismanagement, or the unsecured creditors may disagree with each other on whether to vote for or against a proposed plan of reorganization.

[3] *See* Rapoport, *supra* note 1, at 917–26.

[4] *See* 11 U.S.C. §§ 327, 1107(b) (1994); Rapoport, *supra* note 1, at 926–40.

[5] Because judges and attorneys can't always predict which conflicts are likely to ensue, the gatekeeping function of approving applications for employment of counsel is far from precise. Decisions that overprotect by prohibiting multiple representation will increase the costs for the affected parties, who must then each find separate counsel. *See* Rapoport, *supra* note 1, at 923–26. Decisions that underprotect by permitting multiple representation run the risk that at some point during the case the lawyer representing more than one party will have to withdraw from representing at least one (and probably all) of the parties, thereby causing the affected parties to scramble for new lawyers in the middle of the case. *See id.* at 982–85.

The risk of under- or overprotecting parties in interest is not limited to court approval of lawyers for the official entities. Even when a lawyer considers undertaking multiple representations of creditors in a bankruptcy case, that lawyer must still face the possibility that potential conflicts might force her to withdraw from representation at an inopportune moment. For a possible solution to this problem, see Rapoport, *supra* note 1, at 985–95.

same case,[6] fewer articles touch upon simultaneous representation of those who are not official entities (for whom court approval of the representation is *not* required).[7] The literature does not focus on the linchpin for making the appropriate decision[8] regarding representation: the ability to anticipate and resolve potential conflicts of interest before those conflicts arise. For this reason, we[9] found it appropriate to study the frequency with which experienced bankruptcy lawyers identified potential conflicts in their practice. Before I describe the study, though, one caveat: this study focuses on nonconsumer cases, and specifically on chapter 11 cases (hence, the mention of debtors-in-possession). There are some wonderful studies of consumer bankruptcies.[10] This is not one of them.

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[6] *See, e.g.*, John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986); John T. Cross, *Conflicts of Interest in Bankruptcy Representation*, 1 J. BANKR. L. & PRAC. 233 (1992); Richard L. Epling & Claudia G. Sayre, *Employment of Attorneys by Debtors in Possession: A Proposal for Modification of the Existing Attorney Eligibility Provisions of the Bankruptcy Code and the Existing Conflict of Interest Provisions of the Ethical Rules of Professional Responsibility*, 47 BUS. LAW. 671 (1992); William H. Gindin, *Professionals in Bankruptcy Proceedings: Appointment, Right to Compensation and Conflicts of Interest*, 21 SETON HALL L. REV. 895 (1991); Regina Stango Kelbon et al., *Conflicts, the Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11*, 8 BANKR. DEV. J. 349 (1991); William I. Kohn & Michael P. Shuster, *Deciphering Conflicts of Interest in Bankruptcy Representation*, 98 COM. L.J. 127 (1993); Bernard Shapiro, *Ethical Quandaries of Professionals in Bankruptcy Cases*, C836 ALI-ABA 15 (1993); Jay Lawrence Westbrook, *Fees and Inherent Conflicts of Interest*, 1 AM. BANKR. INST. L. REV. 287 (1993).

[7] *See* Rapoport, *supra* note 1, at 931, 939–40; *see also* Samuel C. Batsell, *Conflicts of Interest: Pre- and Postfiling Representation of Creditors by Counsel for the Estate*, *in* ANNUAL SURVEY OF BANKRUPTCY LAW 51 (William L. Norton, Jr. ed., 1991); Karen Gross and Jeanne M. Weisneck, *Selected Bibliography on Ethics for Bankruptcy Professionals*, 68 AM. BANKR. L.J. 419 (1994); COMMENT ON AMERICAN LAW INSTITUTE RESTATEMENT OF LAW: THE LAW GOVERNING LAWYERS BANKRUPTCY ISSUES PREPARED FOR THE ABA BUSINESS BANKRUPTCY LAW COMMITTEE (1993) (on file with Gerald K. Smith).

[8] Surely the appropriate decision is one that neither over- nor underprotects the client(s).

[9] Although the idea for the study was mine, so many people have helped me with the study that I will use "we" for the remainder of this Article. Please refer to the acknowledgments, *supra* note *, for a more detailed listing of those who worked on this research with me.

[10] *See, e.g.*, TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

II. THE STUDY

A. *Composition of Survey*

1. *The Human Sample Group: Members of the Columbus, Ohio, Bar*

In order to conduct a survey of attorneys who practiced bankruptcy on a more-than-occasional basis, we surveyed two groups during the summer of 1993: members of the Columbus Bar Association's Bankruptcy Law Committee and attorneys who identified themselves as bankruptcy practitioners in the Columbus, Ohio, *Yellow Pages*. These two groups, totaling 158 attorneys, overlapped substantially. All but fourteen attorneys who were listed in the *Yellow Pages* under "bankruptcy law" were also members of the Bankruptcy Law Committee.[11]

2. *The Docket Study: 163 Bankruptcy Cases Filed in Columbus, Ohio*

At approximately the same time that we were studying how practitioners identified their potential conflicts of interest, we also studied the docket sheets of 163 chapter 11 bankruptcy cases filed in Columbus[12] from March 8, 1988, through May 26, 1993. Our objective was to determine how often courts heard conflicts problems in that jurisdiction. We reviewed each docket sheet for any entry that might relate to a conflicts issue, and we paid special attention to fee applications, motions to disqualify counsel, and Rule 2019 statements.[13] Based on a review of the literature and case law and based on my own experience as a bankruptcy lawyer, I determined that those types of pleadings were the ones most likely to raise conflicts issues. Summaries of the relatively few instances in which courts addressed conflicts directly are set forth in Appendix D.

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[11] The list of Committee members was, in fact, overinclusive, as some members of the Bankruptcy Law Committee were not practicing lawyers. Several bankruptcy judges (and their law clerks) were listed, as were several paralegals. Question 1 on the Questionnaire was designed, in part, to eliminate these non-lawyers in our sample. We specifically omitted the non-lawyer responses from our analysis.

[12] Columbus is located within the jurisdiction of the United States Bankruptcy Court for the Southern District of Ohio, Eastern Division.

[13] Bankruptcy Rule 2019 requires attorneys who represent more than one creditor or equity security holder in a case under chapters 9 or 11 of the Bankruptcy Code to file a statement describing the scope of each such representation. *See* BANKR. R. 2019.

B. *The Structure of the Questionnaire*

We designed the Questionnaire[14] to study the simultaneous representation of creditors by lawyers who regularly practice bankruptcy law. Our theory was that those practitioners[15] would be more likely to represent several different types of parties in interest.[16] Theoretically, lawyers who represent different types of parties in interest should be more familiar with the various choices that parties may make during a case and should be more able to identify potential conflicts of interest that might preclude them from representing a given client in a new matter.[17] Therefore, we eliminated from our study lawyers who did not *regularly*[18] practice bankruptcy law.[19]

From the lawyers who regularly practiced bankruptcy law, we obtained information about the size of their practice.[20] If fewer than six lawyers in a particular firm practiced bankruptcy law regularly (a "Small Practice Group"), we asked each of the bankruptcy lawyers to answer certain questions regarding his or her practice.[21] If six or more lawyers in a firm practiced bankruptcy law regularly (a "Large Practice Group"), we chose the less-cumbersome method of examining that bankruptcy practice group as a whole, instead of examining the group on an attorney-by-attorney basis.[22]

Among other things, we asked the attorneys to indicate, based on the 1992

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[14] *See infra* Appendix B.

[15] *See infra* Appendix B, Questions 3 and 10.

[16] That is, we targeted the Questionnaire at lawyers who represented both debtors and creditors.

[17] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989); *see also* Rapoport, *supra* note 1, at 921, 941–56.

[18] We defined "regularity of practice" as more than 20% of an attorney's overall time spent practicing bankruptcy law.

[19] *See infra* Appendix B, Question 2.

[20] *See infra* Appendix B, Question 2.

[21] *See infra* Appendix B, Question 2. In general, the Questionnaire branched into two directions. Certain questions (Questions 3, 4, 5, 6, 7, 8a, and 8b) were directed to Small Practice Groups. Of these questions, Questions 4, 5, and 6 were directed to those Small Practice Groups in which the individual attorneys spent at least 50% of their time practicing bankruptcy and bankruptcy-related law (*e.g.*, workouts and restructuring). Questions 7, 8a, and 8b were directed to those Small Practice Groups in which none of the members spent 50% or more time practicing bankruptcy or bankruptcy-related law. Questions 9, 10, 11, 12, 13, 14a, 14b, 15, and 16 were addressed to those lawyers working in Large Practice Groups.

[22] We also sought lawyers who would be willing to speak with us about their experiences in dealing with conflicts of interest. *See infra* Appendix B, Questions 15 and 16. Due to competing time demands, though, we collected very little anecdotal evidence.

calendar year (the "past calendar year"),[23] how much of their practice was devoted to bankruptcy law.[24] We surveyed the attorneys as to what types of parties in interest (debtors, creditors, creditors' committees, trustees, third-party purchasers, or other entities) they represented.[25] We also asked how much time they spent representing clients in cases under chapters 7, 9, 11, 12, or 13 of the Bankruptcy Code[26] or in pre-bankruptcy workouts or restructuring.[27]

Sensitivity to potential conflicts of interest is more critical in creditor representation than in the representation of official entities because the bankruptcy court does not approve creditor representation (aside from requiring a Rule 2019 statement in certain situations).[28] Therefore, the Questionnaire focused certain questions solely on the issue of creditor representation. We asked the attorneys to indicate how much of their representation of creditors was "repeat business," that is, representation of the same creditor in different cases.[29] We also asked the attorneys to indicate how often, in 1992, they were unable to take on a representation of a creditor because of a conflict of interest created by an existing or prior representation of another client.[30] With these questions, we hoped to get a strong sense of how often simultaneous representation of creditors created a conflict of interest for attorneys.

C. *Pilot-Testing the Questionnaire*

In order to test the Questionnaire for clarity, we sent copies to three selected bankruptcy practitioners in San Francisco, California. Of these practitioners, one was a partner at a large law firm with a small bankruptcy practice, another was a partner at a small law firm with a small bankruptcy practice, and the third attorney was a partner at a small law firm that specialized in bankruptcy law and related issues. Each of the three attorneys answered the Questionnaire and returned it with no comments about the wording of any of the questions. One attorney did express doubts as to the

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[23] Questions 3, 4, 5, 7, 8, 10, 11, 12, 13, and 14 referred to the past calendar year (1992).

[24] *See infra* Appendix B, Questions 3 and 10.

[25] *See infra* Appendix B, Questions 6 and 11.

[26] 11 U.S.C. §§ 101–1330 (1996). Unfortunately, we lost or did not analyze much of the data concerning the chapter breakdown, *see infra* note 34, so we can't make any conclusions as to whether the Questionnaire was answered mostly by bankruptcy lawyers practicing consumer bankruptcy law or those practicing business bankruptcy law.

[27] *See infra* Appendix B, Questions 5 and 12.

[28] *See supra* note 13.

[29] *See infra* Appendix B, Questions 7 and 13.

[30] *See infra* Appendix B, Questions 8 and 14.

pinpoint accuracy of responses to the Questionnaire, but that attorney was nonetheless able to answer the Questionnaire using round numbers.[31]

D. *Multiple Mailings of the Questionnaire*

We mailed 158 packages of materials on June 8, 1993. Of these packages, we received sixty-two responses. On July 15, 1993, we mailed a second set of materials to those who had not responded to the first mailing.[32] Thirty-five participants responded to the second mailing. After eliminating responses from non-attorneys,[33] we analyzed the eighty-four remaining responses.[34]

E. *Materials Sent to Participants*

Participants in the first round of mailings received a package containing three items: a letter describing the study,[35] the Questionnaire itself,[36] and a postage-paid envelope in which to return the Questionnaire. Participants in the second round of mailings received the Questionnaire, a postage-paid envelope, and a letter slightly different from the letter sent to the first round of participants.[37] Each Questionnaire was stamped with an identifying number to preserve the participant's anonymity. That identifying number enabled us to determine who had (or had not) responded. When a participant returned the

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[31] After examining our results, I now believe that the Questionnaire was not particularly well-written or useful for studying the simultaneous representation of creditors. Mistakes that occurred in drafting the Questionnaire are largely to blame for any attorney confusion. Overall, the results are useful as starting points for analysis but are not conclusive evidence as to how often Columbus bankruptcy attorneys self-identified potential conflicts.

[32] See Appendix C for the letter included in the package of materials sent to those subjects who had not responded to the first mailing.

[33] We also eliminated responses from participants who could not respond for other reasons (for example, maternity leave) and those in which one participant responded for an entire law firm, contrary to instructions.

[34] Of the 84 attorneys, 62 reported that they practiced in Small Practice Groups, and 20 reported that they practiced in Large Practice Groups. Two reported that they did not practice bankruptcy law. *See infra* Appendix F, Question 2.

Unfortunately, the number of attorneys who practiced in Large Practice Groups was too small for us to derive much confidence in any extrapolation of the results. Moreover, for a variety of reasons, we did not complete (or we lost) the analysis of many of the questions relating to lawyers in Small Practice Groups. Therefore, the overall analysis of the Questionnaire is useful only as anecdotal information.

[35] *See infra* Appendix A.

[36] *See infra* Appendix B.

[37] *See infra* Appendix C.

Questionnaire, we simply recorded the number associated with that Questionnaire so that, in our follow-up mailing, we would only send materials to those who had not yet responded.

III. THE RESPONSES

A. *The Questionnaire*

Before conducting any in-depth data analysis, we reviewed the responses from the first and second mailings.[38] We were concerned that the two groups of respondents represented disparate perspectives. We compared responses to questions 2, 7, 8, 9, 10, 11, 13, and 14.[39] The comparisons showed little difference between those lawyers who responded to the initial mailing of the Questionnaire and those who responded to the second mailing.[40] The similarities in responses suggested that a lawyer's reasons for not responding to the first mailing were not strongly related to the Questionnaire itself. Based on these comparisons, we took an educated guess that the Questionnaire responses for the nonresponding lawyers would be similar to those of the lawyers who did respond and that the lack of response of some firms did not seriously bias the results of this study.[41]

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[38] Had the responses not been so similar, we would have continued to sample the remaining subjects who had not returned the Questionnaire. Because the mailed Questionnaire format traditionally does not have a high response rate, *see, e.g.*, JUDITH T. LESSLER & WILLIAM D. KALSBEEK, NONSAMPLING ERROR IN SURVEYS (1992), our chances for substantially increasing the number of responses beyond the responses gleaned from the second mailing were low.

[39] *See infra* Appendix B; *supra* notes 31 and 34. The statistician did not analyze the other questions. For questions that had a numerical response, we calculated the mean response and the standard deviation in the responses for those responding to the first or second mailings. For questions that required responses referring to categories, we obtained the percentage of responses in each category for those responding to the first or second mailings.

[40] For a full comparison of the respondents to the first and second mailings, see Appendix F. The one instance that caused us to question the similarity of responses to the first and second mailings involved the response to Question 11b ("What percentage of your firm's *bankruptcy practice* was spent on Creditor cases in the past calendar year?"). The firms that responded to the first mailing reported somewhat higher percentages than did firms responding to the second mailing.

[41] Because we did not actually observe the behavior of the nonresponding firms, however, we do not know if the responding and nonresponding firms are different; nonetheless, our comparison of the two mailings lends some support to the theory that any differences may not be too serious. *But see supra* notes 31 and 34 (questioning the

B. *The Docket Study*

Aside from the massive *Cardinal Industries* docket,[42] only eleven of the 163 cases that we studied addressed conflicts of interest in such a way that the conflicts dispute made its way onto the court's docket sheet.[43] Finding only eleven instances of docket-recorded conflict disputes is not conclusive proof that these were the only conflicts problems in the 163 cases that we researched. Attorneys often resolve conflicts problems informally with a telephone call or a letter. Thus, cases typically reach the docket sheet because of a failure of less formal means of resolving the problem.[44] In any event, our docket sheet study provides some anecdotal information on the frequency with which attorneys formally raise conflicts issues.

Questionnaire's usefulness in general).

[42] The *Cardinal Industries* cases included the following 32 docket numbers: *In re* Pinewood Village Apts., Ltd., No. 89-01854; *In re* The Albany Motel, Ltd., DBA Knights Inn, No. 89-01855; Ramblewood Apts. of Richmond County, No. 89-01857; Southlake Cove Apts. of Richmond County, No. 89-01862; Poplar Springs Apts. of Atlanta, Ltd., No. 89-01863; Hartford Run Apts. of Buford II, No. 89-01864; Poplar Springs Apts. of Atlanta II, No. 89-01865; *In re* Laurel East Motel, Ltd., No. 89-02795; *In re* Ramblewood Apts. of Richmond County, No. 89-06305; *In re* Shadowood Apts. II, No. 89-07308; *In re* Winter Woods Apts. II, Ltd., No. 90-01365; *In re* Hickory Mill Apts. of Columbus, Ltd., No. 90-01975; *In re* Pine Terrace Apts. II, Ltd., No. 90-01210; *In re* Curiosity Creek Apts. Ltd., No. 90-01252; *In re* Sunrise Apts. II, Ltd., No. 90-02085; *In re* Willowood Apts. of Frankfort II, Ltd., No. 90-01251; *In re* Meadowood Apts. of Columbus II, Ltd., No. 90-01973; *In re* Woodland Apts. II, Ltd., No. 90-02084; *In re* Stonehenge Apts. of Stark County, Ltd., No. 90-03306; *In re* Hartford Run Apts. of Buford IV, Ltd., No. 90-01456; *In re* Hickory Mill Apts. of Fort Wayne, Ltd., No. 90-02729; *In re* Florence North Motel, Ltd., No. 90-02179; *In re* Sunset Ridge Apts. of York County, No. 90-03307; *In re* Millston Apts. of Aberdeen, Ltd., No. 90-04677; *In re* Battle Creek South Motel, No. 90-03188; *In re* Cincinnati South Venture, No. 90-05270; *In re* Sunset Ridge Apts. of York County, No. 90-03307; *In re* Lakewood, Ltd., No. 91-03042; *In re* South Bend Venture, Ltd., No. 91-25842; *In re* Meadowood Apts. of Mansfield, Ltd., No. [number not recorded]; *In re* Cambridge Commons Apts. of Indianapolis III, Ltd., No. 93-50538; and *In re* Branchwood Apts. II, Ltd., No. 92-24158.

[43] *See infra* Appendix D.

[44] *Cf. The Fine Art of Negotiation*, BANKR. CT. DECISIONS WKLY. NEWS & COMMENT, May 26, 1994, at A12 (discussing the "win-win" negotiation techniques of several skilled bankruptcy lawyers).

IV. THE ANALYSIS

A. *The Questionnaire*

1. *Number of Bankruptcy Practitioners*

Sixty-two of the eighty-four respondents indicated that they practiced in a Small Practice Group,[45] and twenty of the eighty-four participants indicated that they practiced in Large Practice Groups.[46]

2. *Study of the Lawyers in the Small Practice Groups*

Although some of the data relating to lawyers in Small Practice Groups was lost or not analyzed,[47] we were able to study two aspects of Small Practice Group practice. Question 7 asked the following: Of the firm's total *creditor* representation in 1992, what percentage of the business was "repeat business"?[48] Eighteen of the fifty-four lawyers who answered in the 0–100% range responded that they had no repeat-creditor business. Thirteen lawyers responded that they had 1–20% of repeat-creditor business in 1992, and thirteen responded that they had 81–100% repeat-creditor business that year. The distribution of repeat-creditor business, therefore, clustered around the "quite a bit" and "not a lot" ends of the spectrum.

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[45] *See supra* text accompanying note 21.

[46] *See supra* text accompanying note 22.

[47] The data lost or not analyzed, *see supra* note 26, related primarily to Questions 3–6 and Question 12. Question 3 was designed to determine the percentage of each attorney's time spent in bankruptcy practice throughout 1992. Question 4 was designed to determine, for those who spent at least 50% of their time practicing bankruptcy law in 1992, the percentage of time representing various parties in interest. Question 5 was designed to determine (again, for Small Practice Group members spending at least 50% of their time practicing bankruptcy law in 1992) the percentage of time spent practicing in cases filed under chapters 7, 9, 11, 12, and 13. Question 12 asked for the same information (percentage of time spent practicing in the various chapters) but for lawyers in the Large Practice Groups. Question 6 was designed to determine the level of each lawyer's experience by asking about the number of years that the lawyer had spent practicing bankruptcy law.

[48] Responses to Question 7:

No response	"I don't know"	0%	1–20%	21–40%	41–60%	61–80%	81–100%	Total
8	22	18	13	2	2	6	13	84

I expected repeat business to be related in some way to perceived conflicts of interest the more often that a lawyer represents a creditor, the more information that the lawyer will learn about that creditor. If the representation of a potential new client implicates the repeat-business creditor in some way either in terms of jeopardizing the creditor's confidences[49] or affecting the lawyer's ability to represent both the creditor and the new client[50] then the ethics rules may prevent the lawyer from accepting the new matter.[51]

Question 8 was designed to ferret out how often the lawyers in Small Practice Groups believed themselves to be "conflicted out" of a new creditor client representation in 1992 due to the current or former representation of another client.[52] Fifty-three of the respondents answered in percentages ranging

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[49] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1989) (general rule regarding confidentiality); *id.* at Rule 1.9(b) (lawyer cannot use a former client's confidences to the former client's disadvantage); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) (preserving the confidences and secrets of the client); *id.* at DR 4-101 (general rule).

[50] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989) (lawyer shall not represent another client unless the lawyer reasonably believes that the new representation will not adversely affect the current representation and both clients consent; special waiver rules for simultaneous representation of multiple clients in a single matter); *id.* at Rule 1.9 (lawyer cannot represent a new client in a matter substantially related to a former client in which the new client's interests would be materially adverse to those of the former client unless the former client consents); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980) (a lawyer cannot represent a new client if that new representation is likely to affect the lawyer's independent professional judgment; special waiver for representation of multiple clients).

[51] The lawyer's decision to take on the new matter depends in part on whether the repeat-business creditor is still a current client or has become a former client. The rules about taking on matters that conflict with the interests of *current* clients, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989); *supra* text accompanying note 49, are more stringent than those relating to new matters that conflict with the interests of *former* clients, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule 1.9; *supra* text accompanying note 50. Current clients are entitled to a lawyer's undivided loyalty and her protection of confidences. Former clients are primarily entitled to a lawyer's protection of confidences. *See, e.g.*, Rapoport, *supra* note 1, at 940–65. Ohio's guidelines for professional conduct are based on the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY (1970).

[52] Note that Question 8 did not limit its possible responses to conflicts with another *creditor* client; it just asked about potential conflicts with "another client." It is possible that some of the responses related to conflicts in representing a creditor client against a current or former *debtor* client. It would have been useful to distinguish perceived conflicts on the basis of whether they were creditor-creditor, creditor-debtor, or a creditor and some other entity, but the Questionnaire did not gather that information.

Question 8a asked, "[a]s a percentage of *potential* bankruptcy business in the past calendar year, how often was the firm unable to represent a *creditor* client in a bankruptcy

from 0–40%. Forty of the fifty-three (or roughly 75%) reported never identifying such a prohibitive conflict with a current client in 1992. This left only thirteen of the fifty-three (roughly 25%) who could identify any non-waivable conflicts: eleven of those thirteen reported a conflict with a current client that affected 1–20% of their business in 1992, and two of the thirteen reported a conflict with a current client that affected 21–40% of their business in that year. It's possible that very few of the respondents reported being conflicted out more than 20% of the time because the Small Practice Groups did not have much repeat-creditor representation. It's also possible that the Small Practice Groups experienced no conflicts (or perhaps conflicts occurred but were not identified).

I had expected that conflicts with former clients would be identified less frequently than conflicts with current clients because the ethics rules protect current clients more than they do former clients.[53] The responses to Question 8b were consistent with my expectations.[54] Forty of the fifty-three respondents reported no conflicts with former clients in 1992, and only thirteen of the fifty-three identified a conflict that affected 1–20% of their potential bankruptcy business in 1992. Overall, although thirty-six of the sixty-two attorneys (58%) in the Small Practice Groups identified some percentage of repeat-creditor business in 1992, the repeat business does not seem to have been a significant bar to those lawyers' decisions to undertake new client representations that year.

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case because *current* representation of another client created a conflict of interest?"

The responses were as follows:

No response	"Not applicable"	0%	1–20%	21–40%	Total
7	24	40	11	2	84

Question 8b asked, "[a]s a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a *creditor* client in a bankruptcy case because *past* representation of another client created a conflict of interest?"

The responses were as follows:

No response	"Not applicable"	0%	1–20%	Total
7	24	40	13	84

[53] *See supra* note 51.

[54] *See supra* note 52.

3. *Study of the Lawyers in the Large Practice Groups*

In 1992, lawyers in the Large Practice Groups tended to have upwards of ten attorneys working together,[55] and most of them tended to spend less than 40% of their time doing strictly bankruptcy-related work.[56] In fact, thirteen of the twenty Large Practice Group attorneys spent only 1–20% of their time doing bankruptcy work. It follows that the reported percentages of time these attorneys spent working for particular types of parties represent a relatively small share of their total workload.[57]

In 1992, the attorneys in the Large Practice Groups divided their bankruptcy practice mostly between debtor work (most of them probably spent 20–30% of their time on debtor work)[58] and creditor work (most of them

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[55] Responses to Question 9 ("How many attorneys in your firm currently practice bankruptcy law?") were as follows:

1st mailing	Mean = 13	Standard deviation = 13.12	n = 13
2nd mailing	Mean = 14.92	Standard deviation = 8.5	n = 6

[56] Responses to Question 10 ("What percentage of the *total work hours* of your firm was spent practicing bankruptcy law in the past calendar year?") were as follows:

No response	"I don't know"	"Not applicable"	1–20%	21–40%	Total
1	3	64	13	3	84

[57] I am assuming that the percentage is somewhat closer to 20% than to 1% otherwise, I doubt that the attorneys would have identified themselves as *bankruptcy* attorneys. On the other hand, the question could simply have been confusing.

[58] Responses to Question 11a ("What percentage of your firm's *bankruptcy practice* was spent on **Debtor** cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?") were as follows:

"I don't know"	"Not applicable"	0–9%	10–29%	30–49%	Greater or equal to 50%	Total
4	64	2	7	5	2	84

For those firms that gave an actual percentage of time spent on debtor work, the average and standard deviations are as follows:

probably spent roughly 35–45% of their time on creditor work).[59] These lawyers spent even less of their time representing creditors' committees,[60]

1st mailing	Mean = 22.7–3%	Standard deviation = 20.29%	n = 11
2nd mailing	Mean = 32.0–0%	Standard deviation = 14.4%	n = 5

[59] Responses to Question 11b ("What percentage of your firm's *bankruptcy practice* was spent on **Creditor** cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?") were as follows:

"I don't know"	"Not applicable"	0–9%	10–29%	30–49%	Greater or equal to 50%	Total
4	64	2	2	6	6	84

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	Mean = 45.4–5%	Standard deviation = 29.61%	n = 11
2nd mailing	Mean = 35.0–0%	Standard deviation = 5.00%	n = 5

Of course, it would have been useful if the Questionnaire had asked the respondents to indicate how often they represented secured creditors, unsecured creditors, trade creditors, tort creditors, and the like.

In answering Question 11b, the lawyers in the first mailing reported somewhat higher percentages than did the lawyers responding to the second mailing. Six firms in the first mailing reported between 60–80% of their time being spent on creditor cases in 1992, while no firm in the second mailing reported over 40%. When the responses to *all* questions are compared, though, the data suggest that there is little difference between the two groups of respondents.

[60] Responses to Question 11c ("What percentage of your firm's *bankruptcy practice* was spent on **Creditors' Committee** cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?") were as follows:

"I don't know"	"Not applicable"	0–10%	11–30%	Total
5	64	9	6	84

For those firms that gave a percentage, the average and standard deviations are as

trustees,[61] or third-party purchasers.[62]

follows:

1st mailing	Mean = 9.30%	Standard deviation = 7.78%	n = 10
2nd mailing	Mean = 15.0%	Standard deviation = 8.66%	n = 5

[61] Responses to Question 11d ("What percentage of your firm's *bankruptcy practice* was spent on **Trustee** cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?") were as follows:

"I don't know"	"Not applicable"	0–10%	11–30%	Total
4	64	12	4	84

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	Mean = 7.09%	Standard deviation = 8.76%	n = 11
2nd mailing	Mean = 10.0–0%	Standard deviation = 11.73%	n = 5

[62] Responses to Question 11e ("What percentage of your firm's *bankruptcy practice* was spent on **Third Party** cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?") were as follows:

"I don't know"	"Not applicable"	0–10%	11–30%	Total
4	64	14	2	84

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	Mean = 4.73%	Standard deviation = 6.69%	n = 11
2nd mailing	Mean = 4.00%	Standard deviation = 4.18%	n = 5

There was still some room for representing parties in interest who were not debtors, creditors, creditors' committees, trustees, or third-party purchasers. Question 11f asked "[w]hat percentage of your firm's *bankruptcy practice* was spent on **Other** cases in the past

Sixteen of the twenty lawyers in the Large Practice Group had some repeat-creditor business in 1992, although the range ran the gamut from the lowest quintile (1–20%) to the highest (81–100%). The largest cluster of the respondents (seven of the twenty) reported that repeat-creditor business comprised 41–60% of their time in 1992.[63]

Based on the amount of repeat-creditor business, I expected to find some significant "conflicting-out" of new matters due to current or former clients.[64] Eleven of the twenty in the Large Practice Groups reported losing 1–20% of their 1992 business due to conflicts with current clients, and three more reported losing 21–40% of that year's business based on such conflicts.[65] As

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calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?" The responses were as follows:

"I don't know"	"Not applicable"	0–10%	11–50%	Total
4	64	13	3	84

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	Mean = 9.27%	Standard deviation = 13.59%	n = 11
2nd mailing	Mean = 4.00%	Standard deviation = 4.18%	n = 5

[63] Responses to Question 13 ("Of the firm's total *creditor* representation in the past calendar year, what percentage of the business was 'repeat business'?"):

No response	"I don't know"	1–20%	21–40%	41–60%	61–80%	81–100%	Total
4	64	2	2	7	3	2	84

I interpreted the two responses in the 81–100% range as indicating that the law firm was one of the first choices of that creditor client.

[64] Question 14 suffered from the same poor wording as Question 8: neither question asked the lawyer to report whether the conflicting (current or former) client was also a creditor or was some other type of party in interest. *See supra* note 52.

[65] Responses to Question 14a ("As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a *creditor* client in a bankruptcy case because *current* representation of another client created a conflict of interest?") were as follows:

with the responses to Question 8,[66] fewer attorneys reported being conflicted out by past clients,[67] although the results were not as dramatic for lawyers in the Large Practice Groups as they were for those in the Small Practice Groups.[68] Overall, my original (and cynical) theory that lawyers would not take conflicts of interest very seriously in weighing whether to undertake a new representation is contradicted by the results of this survey. At least *some* lawyers have turned down new business because of conflicts with current or former clients.

B. *The Docket Study*

Of the 163 cases studied during the review period, eleven of them (around 7%) raised a conflict of interest issue important enough to be recorded on the court's docket sheet.[69] In eight of these eleven cases, the conflicts issue was brought to bear at the onset of representation; this early appearance was dictated by the issue's having its genesis in the court's appointment of counsel for an official entity. In the remaining three cases, the lawyers raised conflict of interest issues for one tactical reason or another. The number of times that conflicts disputes reached a docket sheet was too small for me to draw any real conclusions: it's possible that the lawyers resolved most conflicts disputes before the disputes reached the pleadings stage, and it's possible that the lawyers did not notice the alleged conflict until it was too late or too expensive to object.

Yet it's interesting that conflicts issues hit the docket even as often as they did. In chapter 11 cases, there are some issues that routinely hit the docket,

No response	"I don't know"	"Not applicable"	1–20%	21–40%	Total
2	4	64	11	3	84

[66] *See supra* text accompanying note 52.

[67] Responses to Question 14b ("As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a *creditor* client in a bankruptcy case because *past* representation of another client created a conflict of interest?") were as follows:

No response	"I don't know"	"Not applicable"	0%	1–20%	21–40%	Total
2	4	64	4	9	1	84

[68] *Cf. supra* note 52.

[69] *See supra* notes 42–44 and accompanying text.

such as stay relief motions, cash collateral financing, and approval of the disclosure statement or confirmation of plan hearings.[70] There are other issues

[70] I searched on LEXIS for the period from 1988 to 1993 in the Southern District of Ohio, Eastern Division. I ran queries such as "petition w/5 (chapter 11)", "stay w/5 (relief or lift)", "cash pre/3 collateral", "confirm! w/5 plan or approve! w/5 (disclosure pre/3 statement)", "preference w/5 547", "fraudulent pre/5 (conveyance or transfer)", and "conflicts pre/3 interest". I then quickly reviewed the list of cites to eliminate District Court (as opposed to Bankruptcy Court) cases or cases before or after the search period of March 8, 1988 to May 26, 1993. Remember, these are cases that simply *mention* the various phrases that I searched. Thus, I assume that the count of cases is overinclusive. That is, many cases probably mentioned the phrases in question in passing rather than actually addressing the issues represented by those phrases.

Here is what I found: 81 cases mentioned "petition w/5 (chapter 11)", and of those cases, 59 were reported bankruptcy court decisions. I do not mean to suggest that there were only 59 chapter 11 cases just that there were 59 *reported decisions*. Fifty-nine reported decisions in a field of 163 chapter 11 cases seems about right.

SEARCH PHRASE	NO. OF TOTAL CASES (DISTRICT & BANKRUPTCY COURT) BEFORE 1994 AND AFTER 1987	REPORTED BANKRUPTCY DECISIONS DURING THE SEARCH PERIOD
"stay w/5 (relief or lift)"	67	60
"cash pre/3 collateral"	27	25
"confirm! w/5 plan or approve! w/5 (disclosure pre/3 statement)"	115	92
"preference w/5 547"	10	8
"fraudulent pre/5 (conveyance or transfer)"	26	19
"conflicts pre/3 interest"	15	11, not counting the 3 *Cardinal Industries* cases

Before anyone gets too excited about the fact that I found 11 reported bankruptcy opinions involving conflicts of interest, I want to make it clear that the 11 cases in the LEXIS search were not identical to those in my docket study. For one thing, three of the 11 LEXIS cases were chapter 7 cases and one case appeared three times in the same search. This reduces the total to five cases that mentioned "conflicts pre/3 interest" in a chapter 11 context.

Some final comments about the docket study methodology are warranted: The *Lee Way* case docket was not available for my docket study, having been large enough to have been kept elsewhere. It is nice to know that the LEXIS search found the *Urgent Medical Care* case, but it is a little troubling that the LEXIS search did not find the *Hickory Mills* case. All in all, I would characterize the docket study as "somewhat reliable." *See infra* Appendix D.

that are commonly on the docket but that do not occur as routinely, such as preference and fraudulent transfer litigation. Conflicts issues fall into this latter, "less-raised" category.[71] It would be productive to go back through the search period and study the proportion of other types of less-raised issues raised under the various chapters, but such a study is beyond the scope of this Article.

V. CONCLUSIONS AND RECOMMENDATIONS

I had hoped to find some evidence from this study that lawyers were making appropriate decisions concerning simultaneous representation of clients in a given bankruptcy case.[72] The design of my study did not achieve these objectives. The questions did not (and really *could* not) examine whether the lawyers had "guessed right" in deciding that they had or had not been conflicted out of new matters. The docket study was similarly inconclusive.

But there may be other ways to get this information. Anecdotal interviews of lawyers, which explore the facts and factors surrounding decisions to take or refuse new matters, would enable us to study patterns of conflicts decisionmaking.[73] Interviews with judges would enable us to get a second opinion on lawyers' choices, as well as a sense of whether the judges themselves were comfortable in applying the traditional conflict of interest rules.[74] Although interviews are more time-consuming than other forms of data-gathering (and have their own problems),[75] they are particularly well-suited for studying the complex decisionmaking involved in conflicts issues.

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[71] For this bold assertion, I am going back to my count of 11 non-*Cardinal Industries* conflicts cases from the LEXIS search, acknowledging all the while that I did not segregate chapter 11 cases in any of my other "phrase" searches besides the original "petition w/5 (chapter 11)" search.

[72] In particular, I had hoped to find that lawyers (and judges) were flexible in their application of ethics rules to potential conflicts situations. In my 1994 article, I argued that the standard ethics rules were too inflexible to take into account the constant side-switching that occurs in bankruptcy cases. I further argued that a sliding-scale approach should govern those dormant, temporary conflicts that are potential for most of a case and actually become manifest, if at all, only for a portion of a case. *See* Rapoport *supra* note 1, at 975-95.

[73] Of course, these interviews would have to preserve client confidences, and I'm sure that the lawyers would want to get each client's permission first.

[74] Judge interviews would presumably involve matters of public record, so confidentiality would not be as much of a concern.

[75] To assure consistency, individual interviewers should at least start from the same "script" of questions. The script of questions should not, however, defeat the flexibility of the interview method. By really *listening* to the answers given, interviewers can make sure that they cover the script without doggedly sticking to that script, and they can go beyond the script when the interview starts to turn in an intriguing (and unplanned) direction.

Knowing the patterns of decisions and the reactions of judges to those patterns will provide an important key to the question of whether lawyers are making the right choices. Are lawyers serving each client's need for economical and efficient representation when they agree to represent more than one client, or are they accepting or declining representation for other less client-centered reasons?

APPENDIX A

Letter Sent to Survey Participants

June 8, 1993

Dear Attorney:

As part of research funded by The Ohio State University, I am conducting a survey of local practices concerning the representation of creditors in bankruptcy cases. In order for me to study this topic, I need your cooperation.

Would you please take the time to answer the enclosed questionnaire and return it to me in the enclosed postage-paid envelope by no later than June 30, 1993? ***All information that you provide on the questionnaire, including information identifying particular law firms or individual respondents, will be kept strictly confidential.*** The identification number on your questionnaire simply permits me to avoid sending you reminders once I have received your response.

To get an accurate picture of current bankruptcy practice, it is important that we receive a reply from everyone. If you have any questions, please call me at 292-4827. Thank you very much for your cooperation.

Very truly yours,

Nancy B. Rapoport
Assistant Professor of Law

APPENDIX B

RAPOPORT BANKRUPTCY QUESTIONNAIRE

1. How many practicing attorneys are currently in your firm? (Please count each part-time attorney as equal to one-half of a full-time attorney.)

_____attorneys

2. How many of the attorneys mentioned above currently practice bankruptcy law, including pre-bankruptcy workouts?

_____None. IF NO ATTORNEYS IN YOUR FIRM PRACTICE BANKRUPTCY LAW, PLEASE STOP NOW AND RETURN THE QUESTIONNAIRE. THANK YOU FOR YOUR TIME.

_____1 to 5. IF 1-5 ATTORNEYS IN YOUR FIRM PRACTICE BANKRUPTCY LAW, PLEASE GO TO QUESTION 3.

_____More than 5. IF MORE THAN 5 ATTORNEYS IN YOUR FIRM PRACTICE BANKRUPTCY LAW, PLEASE GO TO QUESTION 9.

3. For each attorney to which Question 2 refers, please estimate the percentage of that attorney's total work hours in the past calendar year spent practicing bankruptcy law:

	Atty 1	Atty 2	Atty 3	Atty 4	Atty 5
0–20%					
21–40%					
41–60%					
61–80%					
81–100%					

IF ANY ATTORNEY PRACTICED 50% OR MORE BANKRUPTCY LAW IN THE PAST CALENDAR YEAR, PLEASE GO TO QUESTION 4. IF ALL ATTORNEYS PRACTICED LESS THAN 50% BANKRUPTCY LAW IN THE PAST CALENDAR YEAR, PLEASE GO TO QUESTION 7.

4. For each attorney listed in Question 3 who spent at least 50% of total work hours practicing bankruptcy law in the past calendar year, please

estimate the time spent in the following types of representation in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW):

	Atty 1	Atty 2	Atty 3	Atty 4	Atty 5
Debtor					
Creditor					
Creditors' committee					
Trustee					
Third-party purchaser of assets					
Other[76]					
	100%	100%	100%	100%	100%

5. For each attorney listed in Question 3 who spent at least 50% of total work hours practicing bankruptcy law in the past calendar year, please estimate the time spent on the following types of cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW):

	Atty 1	Atty 2	Atty 3	Atty 4	Atty 5
Chapter 7					
Chapter 9					
Chapter 11					
Chapter 12					
Chapter 13					
Pre-bankruptcy workouts or restructuring					
Other					
	100%	100%	100%	100%	100%

6. For each attorney listed in Question 3, please estimate the length of time that that attorney has practiced bankruptcy law:

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[76] *E.g.*, pre-bankruptcy workouts or restructuring.

	Atty 1	Atty 2	Atty 3	Atty 4	Atty 5
1 year or less					
2–4 years					
5–7 years					
7 or more years					

7. Of the firm's total creditor representation in the past calendar year, what percentage of the business was "repeat business" (representing the same creditor in different bankruptcy cases)?

_____ 0% creditor representation

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

8. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case (or pre-bankruptcy workout or restructuring) because:

a. current representation of another client created a conflict of interest?

_____ 0% problem with creditor representation

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

b. past representation of another client created a conflict of interest?

_____ 0% problem with creditor representation

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

IF YOU HAVE ANSWERED QUESTIONS 3–8 FOR ALL ATTORNEYS FOR WHOM THESE QUESTIONS APPLY, PLEASE STOP NOW AND RETURN THE QUESTIONNAIRE. THANK YOU FOR YOUR TIME.

IF MORE THAN 5 ATTORNEYS IN YOUR FIRM CURRENTLY PRACTICE BANKRUPTCY LAW, PLEASE ANSWER THE FOLLOWING QUESTIONS:

9. How many attorneys in your firm currently practice bankruptcy law? (Please count each part-time attorney as equal to one-half of a full-time attorney.)

_____ attorneys

10. What percentage of the total work hours of your firm was spent practicing bankruptcy law in the past calendar year?

_____ 0%

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

11. What percentage of your firm's bankruptcy practice was spent on the following types of cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

Debtor _____

Creditor _____

Creditors Committee _____

Trustee_____

Third-party purchaser of assets_____

Other[77]_____

NOTE: THE SUM OF THESE PERCENTAGES SHOULD TOTAL 100%.

12. What percentage of your firm's bankruptcy practice was spent on the following types of cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	Debtor representation	Creditor representation	Other[78]
Chapter 7			
Chapter 9			
Chapter 11			
Chapter 12			
Chapter 13			
Pre-bankruptcy workouts or restructuring			
Other			

NOTE: THE SUM OF THE COMBINED PERCENTAGE REPRESENTATION CATEGORIES (DEBTOR, CREDITOR, AND

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[77] *E.g.*, pre-bankruptcy workouts or restructuring.

[78] *E.g.*, representation of third-party purchasers of assets.

OTHER) BY CHAPTER SHOULD TOTAL 100%.

13. Of your firm's total creditor representation in the past calendar year, what percent was "repeat business" (representing the same creditor in different bankruptcy cases?)

_____ 0% creditor representation

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

14. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case (or pre-bankruptcy workout or restructuring) because:

a. current representation of another client created a conflict of interest?

_____ 0% problem with creditor representation

_____ 1–20%

_____21–40%

_____41–60%

_____61–80%

_____81–100%

b. past representation of another client created a conflict of interest?

_____ 0% problem with creditor representation

_____ 1–20%

____21–40%

____41–60%

____61–80%

____81–100%

15. Would you be willing to be contacted for a brief interview (about 15 minutes) about your screening procedures for conflicts of interest in your firm? (All responses will be kept strictly confidential.)

____Yes ____No

16. If the answer to Question 15 was yes, please indicate the name and telephone number of the person whom we should contact for an interview:

Name:
Telephone number:

PLEASE STOP NOW AND RETURN THE QUESTIONNAIRE. THANK YOU FOR YOUR TIME.

APPENDIX C

The Second Letter Sent to Survey Participants

July 14, 1993

Dear Attorney:

About a month ago, I sent you a letter asking for your help in gathering information on local practices concerning the representation of creditors in bankruptcy cases. Our records indicate that you have not yet returned the questionnaire that I sent you. If you have not already done so, would you please take the time to answer the enclosed questionnaire and return it to me in the enclosed postage-paid envelope by no later than July 22, 1993?

If you have questions or concerns about the questionnaire or the confidentiality of your responses, please call me at 292-4827. ***All information that you provide on the questionnaire, including information identifying particular law firms or individual respondents, will be kept strictly confidential.*** The identification number on your questionnaire simply permits me to avoid sending you additional reminders once I have received your response.

To get an accurate picture of current bankruptcy practice, it is important that we receive a reply from everyone. Thank you very much for your cooperation.

Very truly yours,

Nancy B. Rapoport

APPENDIX D

Description of the Conflicts of Interest Reviewed in the Docket Study

DOCKET STUDY: REPORTED CONFLICTS-RELATED DOCUMENTS

1. *In re Queen Anne Hotel Co.*, Case No. 91-09795: The debtor-in-possession filed a Motion to Employ Counsel. In that motion, the debtor-in-possession noted a possible conflict: the law firm that wished to represent the debtor-in-possession had a branch office that had previously represented affiliates of the debtor-in-possession's general partners. The United States Trustee filed a Comment Regarding the Application to Employ Attorney, which, after noting that most of the conflicts problems had been resolved to the United States Trustee's satisfaction, then raised another potential conflict. The United States Trustee expressed concern that a third party was planning to pay the retainer of the proposed counsel for the debtor-in-possession. The third party paying the retainer was both a general partner of the debtor-in-possession and an unsecured creditor. The proposed law firm had never represented the third party. The bankruptcy court granted the motion and appointed the counsel for the debtor-in-possession.

2. *In re 1944-DD, Inc.*, Case No. 91-08848: The debtor-in-possession filed a Motion to Employ Counsel. That motion did not list any conflicts of interest. A principal shareholder and the chief executive officer of the debtor-in-possession also filed for bankruptcy protection. The proposed counsel for the debtor-in-possession sought approval to represent the principal shareholder in the shareholder's personal bankruptcy case. The United States Trustee opposed appointment of the same counsel for the two bankruptcy cases. The bankruptcy court approved the appointment in both cases, stating that it did not see a real conflict in representing the two debtors.

3. *In re DCP Development Co.*, Case No. 91-00759: Several related debtors-in-possession filed a Motion to Employ Counsel (Counsel *A*). The United States Trustee requested that the debtors-in-possession send a notice to all creditors regarding possible multiple representation issues implicated by the appointment of proposed Counsel *A*; Counsel *A* then withdrew the Motion to Employ Counsel for all but one debtor, on the grounds that estate funds were better spent elsewhere than on an appointment fight, but Counsel *A* continued to seek appointment as counsel for one of the debtors-in-possession. The bankruptcy court approved the appointment of Counsel *A*. Counsel *B* filed a Motion to Employ Counsel to represent one of the other debtors-in-possession.

In Counsel *B*'s moving papers, Counsel *B* noted that it had previously represented, and still was in the process of representing, several parties in interest in the bankruptcy case but only on a transactional basis and never with respect to the debtor-in-possession that it was seeking to represent. The United States Trustee opposed Counsel *B*'s Motion to Employ Counsel, but the bankruptcy court approved Counsel *B*'s representation of that one debtor-in-possession.

4. *In re Camino Del Sol Health Care Co.*, Case No. 91-03918: The debtor-in-possession filed a Motion to Employ Counsel and noted a possible conflict because the proposed counsel had previously represented a creditor with an interest potentially adverse to the debtor-in-possession. The debtor-in-possession agreed that proposed counsel would not represent that creditor in the future in any matter related to the bankruptcy case and, based on that agreement, the bankruptcy court approved the appointment of counsel.

5. *In re Rax Restaurants, Inc.*, Case No. 92-08584: The debtor-in-possession sought to employ counsel under an emergency application that was filed over a holiday weekend. One creditor objected on due process grounds, arguing that the short notice deprived the creditor of the opportunity to review any multiple representation issues. The court denied the emergency application and required the proposed counsel to supplement the application by addressing the "disinterestedness" requirement of 11 U.S.C. §§ 101(14) and 327(a). Proposed counsel amended its application to comply with the court's order, and the court approved the application.

6. *In re Hamrick*, Case No. 91-06438: The debtor-in-possession filed a Motion to Employ Counsel. A creditor objected to the motion on the grounds that the proposed counsel had previously represented the debtor-in-possession against the creditor and that the counsel might have to be called as a witness in the dispute between the creditor and the debtor-in-possession. The bankruptcy court approved the motion and appointed counsel for the debtor-in-possession.

7. *In re Urgent Medical Care*, Case No. 91-06691:[79] Debtors-in-possession in four related cases filed a Motion to Employ Counsel and a Motion to Employ Special Consultant. The United States Trustee filed a comment expressing concern about the multiple representation of debtors by the same counsel. The United States Trustee also questioned counsel's potential divided loyalties with respect to a third-party guaranty issue in the case. The bankruptcy court

[79] Related to *In re Primary Medical Association*, Case No. 91-00692.

approved both motions.

The debtors-in-possession also sought to employ special tax counsel. The United States Trustee raised the question of "disinterestedness" because the proposed counsel held a pre-petition claim for fees with respect to each debtor-in-possession. The proposed counsel admitted that he had previously represented, and still did represent, various entities with a potential claim against the debtors-in-possession, but he added that he would not represent those non-debtor entities against the debtors-in-possession. The bankruptcy court approved the application to employ special tax counsel.

8. *In re Liaison Homes, Inc.*, Case No. 90-06264: The debtor-in-possession moved for a Rule 2004 examination of a counsel representing a creditor in the case. The application for the Rule 2004 examination cited alleged misconduct by the creditor's counsel based on the counsel's previous representation of the debtor-in-possession.[80] After a hearing, the debtor-in-possession withdrew its motion.

9. *In re Continental Business Services*, Case No. 92-01661: Debtor-in-possession *A* filed a Motion to Employ Special Counsel to represent it in matters related to a dispute with its former president. Debtor-in-possession *A*'s general bankruptcy counsel also represented one of the related potential defendants (defendant *B*) in the dispute, and so the motion alleged that special counsel for debtor-in-possession *A* was necessary. The general bankruptcy counsel moved to withdraw, and the bankruptcy court approved both the Motion to Employ Special Counsel and the general counsel's Motion to Withdraw. After the dispute with the former president was resolved, the former general bankruptcy counsel for debtor-in-possession *A* moved for reappointment as general counsel, and the bankruptcy court approved the motion, given that defendant *B* had secured, by that time, its own separate counsel.

10. *In re Horizon Insurance*, Case No. 88-02638: In a related adversary proceeding (Case No. 90-0074), counsel for the debtor-in-possession moved to withdraw, and new counsel moved to be appointed. The defendant in the adversary proceeding objected on the grounds that counsel represented a creditor in the case and was also a 50% shareholder of the debtor. The bankruptcy court held that counsel was not "disinterested" and denied the motion for appointment of counsel.

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[80] In its application for the Rule 2004 examination, the debtor-in-possession cited to DR 4-101(B) and DR 5-104 of the Code of Professional Responsibility (1980).

11. *In re Motive Power Sales and Service*, Case No. 92-08887: The debtor-in-possession filed a Motion to Employ Counsel. In the moving papers, counsel stated that he was only connected to one party in interest but did not specify exactly what that connection was, and the United States Trustee asked counsel to clarify the relationship. After counsel complied, the United States Trustee withdrew his comment that had requested clarification. Later, the debtor-in-possession substituted new counsel for apparently unrelated reasons.

The *Cardinal Industries* Cases

12. *In re Pinewood Village Apts., Ltd.*, Case No. 89-01854: The debtor filed an Application to Employ Counsel. The United States Trustee filed a comment stating that proposed counsel represented both the debtor limited partnership and an insider of the debtor (the general partner, Cardinal Industries, Inc.). Proposed counsel withdrew his Application.

13. *In re Laurel East Motel, Ltd.*, Case No. 89-02795: The debtor withdrew its Application to Employ Counsel after it found that the proposed counsel had an agreement to make himself available to represent certain limited partnerships in which Cardinal Industries, Inc. was a general partner.[81]

14. *In re Ramblewood Apts. of Richmond County*, Case No. 89-06305: Debtor filed an Application to Employ Counsel. A creditor objected on the grounds that the funds used to pay the proposed counsel's retainer belonged to the creditor as a result of its security interest. The bankruptcy court approved the Application.

15. *In re Shadowood Apts. II, Ltd.*, Case No. 89-07308: Counsel for debtor filed a Motion for the Appointment of Trustee, Replacement of General Partner, or Other Instructions as the Court May See Fit. Because the appointment of a trustee to assume management of the estate raised various concerns regarding disclosures of attorney-client privileged communications, the Cardinal Industries Trustee (Cardinal Industries was the managing partner of this debtor) moved to remove counsel for debtor. The bankruptcy court denied the motion, holding that counsel for the limited partnership could not,

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[81] *See also In re* The Albany Motel, Ltd., DBA Knights Inn, Case No. 89-01855; Ramblewood Apts. of Richmond County, Case No. 89-01857; Southlake Cove Apts. of Richmond County, Case No. 89-01862; Poplar Springs Apts. of Atlanta, Ltd., Case No. 89-01863; Hartford Run Apts. of Buford II, Case No. 89-01864; Poplar Springs Apts. of Atlanta II, Case No. 89-01865.

acting without direction, bring an action to replace the management structure of the client partnership. Such an action, the court ruled, would pit the attorney against the client's management. Instead, the moving counsel consented to substitution of new counsel and the Trustee's Motion to Remove Counsel became moot.[82]

16. *In re Hartford Run Apts. of Buford IV, Ltd.*, Case No. 90-01456: Creditor objected to the appointment of debtor's counsel on the grounds that it had a perfected, superior security interest in the funds (cash collateral) from which any attorney fees would be paid. The creditor later withdrew its objection.[83]

17. *In re Millston Apts. of Aberdeen, Ltd.*, Case No. 90-04677: Creditor objected to the appointment of counsel for the debtor on the grounds that the creditor had a security interest in the moneys from which the counsel would be paid. A stipulated order authorizing the appointment of counsel was entered.[84]

18. *In re Florence North Motel, Ltd.*, Case No. 90-02179: Co-counsel for debtor moved to withdraw because he could no longer work well with the client and its general partner. A trustee was appointed, and the trustee supported the motion to withdraw. The court granted the motion.[85]

19. *In re Battle Creek South Motel*, Case No. 90-03188: The attorney for the receiver moved to withdraw (1) because the general partner and the receiver had agreed in principle to resolve the case and implementation of the agreement would require little, if any, additional counsel, (2) because the case had been inactive for over a year, and (3) because continued representation would cause

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[82] This opinion was also filed in *In re* Winter Woods Apts. II, Ltd., Case No. 90-01365; *In re* Hickory Mill Apts. of Columbus, Ltd., Case No. 90- 01975; *In re* Pine Terrace Apts. II, Ltd., Case No. 90-01210; *In re* Curiosity Creek Apts. Ltd., Case No. 90-01252; *In re* Sunrise Apts. II, Ltd., Case No. 90-02085; *In re* Willowood Apts. of Frankfort II, Ltd., Case No. 90- 01251; *In re* Meadowood Apts. of Columbus II, Ltd., Case No. 90-01973; *In re* Woodland Apts. II, Ltd., Case No. 90-02084; and *In re* Stonehenge Apts. of Stark County, Ltd., Case No. 90-03306.

[83] *See also In re Hickory Mill Apts. of Fort Wayne, Ltd.*, Case No. 90-02729 (same objection and result); *In re Meadowood Apts. of Mansfield, Ltd.* (same objection and result); *In re Cambridge Commons Apts. of Indianapolis III, Ltd.*, Case No. 93-50538 (same objection and result).

[84] *See also In re Branchwood Apts. II, Ltd.*, Case No. 92-24158 (same objection and result).

[85] *See also In re Sunset Ridge Apts. of York County*, Case No. 90-03307.

an unspecified potential conflict of interest based on the receiver's current clients. The bankruptcy court approved the motion to withdraw.

20. *In re Lakewood, Ltd.*, Case No. 91-03142: Counsel moved to withdraw, pursuant to Local Bankruptcy Rule 4.1(e), from the representation of the FDIC as receiver because, among other things, the continued representation would present a potential conflict of interest with counsel's other existing clients. The bankruptcy court granted the motion to withdraw.

21. *In re South Bend Venture, Ltd.*, Case No. 91-25842: In an adversary proceeding related to the case, the debtor filed a motion to recuse based on the argument that the bankruptcy judge's former law clerk had made an appearance in this case on behalf of Cardinal Industries. The bankruptcy court found the allegations untrue and denied the motion to recuse.

22. *In re Cincinnati South Venture (Cincinnati South Venture v. Economy Lodging Systems, Inc.)*, Case No. 90-05270 (Adv. Proc. No. 93-0073): Debtor moved to employ Counsel *A* as special counsel for the adversary proceeding. Defendant in the proceeding objected on a variety of grounds. The bankruptcy court denied the Motion to Employ Special Counsel on the grounds that Counsel *A* represented Cardinal Realty Services, Inc., the general partner of the debtor/plaintiff. The bankruptcy court denied the motion to employ counsel because of a potential conflict with Cardinal Realty Services, Inc.[86]

[86] The same result occurred in North Indianapolis Venture v. Economy Lodging Systems, Inc., Case No. 90-00154 (Adv. Proc. No. 93-0083); Merrillville Venture v. Economy Lodging Systems, Inc., Case No. 90-03189 (Adv. Proc. No. 93-0074); Pittsburgh/Bridgeville Venture v. Economy Lodging Systems, Inc., Case No. 90-05271 (Adv. Proc. No. 93-0078); Clarion S.R. 68 Motel v. Economy Lodging Systems, Inc., Case No. 90-05272 (Adv. Proc. No. 93-0082); Akron South Venture v. Economy Lodging Systems, Inc., Case No. 90-05284 (Adv. Proc. No. 93-0079); Pooler Motel v. Economy Lodging Systems, Inc., Case No. 90-05625 (Adv. Proc. No. 93-0076); Detroit-Madison Heights II Venture v. Economy Lodging Systems, Inc., Case No. 90-06009 (Adv. Proc. No. 93-0077); East Indianapolis Venture v. Economy Lodging Systems, Inc., Case No. 90-06013 (Adv. Proc. No. 93-0075); Knights Inn East v. Economy Lodging Systems, Inc., Case No. 90-07970 (Adv. Proc. No. 93-0081); South Bend Venture v. Economy Lodging Systems, Inc., Case No. 90-05842 (Adv. Proc. No. 93-0080).

APPENDIX E

Table of the Conflicts of Interest Reviewed in the Docket Study

	Case involving representation of an official entity[87]	Case involving representation of a party in interest who is not an official entity
Conflict alleged based on the prior representation of another official entity		*Liaison Homes*
Conflict alleged based on the current representation of another official entity	*1944-DD*; *Continental Business Services*; *DCP Dev. Co.*; *In re Pinewood Village Apts., Ltd.* (counted twice in this study); *In re Florence North Motel, Ltd.*	
Allegations that counsel is not "disinterested" within the meaning of 11 U.S.C. §§ 101(14) and 327	*Rax*; *Urgent Medical Care*; *In re Pinewood Village Apts., Ltd.* (counted twice in this study); *In re Laurel East Motel, Ltd.*; *In re Cincinnati South Venture*	
Conflict alleged based on the prior representation of a party in interest who is not an official entity	*Queen Anne Hotel Co.*; *DCP Dev. Co.*; *Camino Del Sol*; *Hamrick*	
Conflict alleged based on the current representation of a party in interest who is not an official entity	*Queen Anne Hotel Co.*; *DCP Dev. Co.*; *Urgent Medical Care*; *Horizon Insurance*	*In re Battle Creek South Motel*; *In re Lakewood, Ltd.*

[87] An "official entity" is one for whom court appointment of counsel is required pursuant to 11 U.S.C. §§ 327, 1103 (1994).

APPENDIX F

Comparison of Respondents to First and Second Mailings

I. BACKGROUND INFORMATION

The following shows, for each question that allowed comparison, a comparison of responses to the first and second mailings. Each table below shows the counts for the various possible responses. In addition, the row percentages are given in parentheses and the expected cell counts, assuming no difference between the responses for the two mailings, are given in square brackets. The chi-squared statistics, comparing observed to expected cell counts (along with the associated degrees of freedom), are set forth after each table. Because some of the cell counts are small or zero, the chi-squared statistic should only be used to indicate similarity or differences between the respondents to the two mailings rather than in a formal test of null hypothesis.

Please note that, in the tables, the following codes were used:

-9: Missing data (*i.e.*, the respondent left the question blank)

-5: Unknown (*i.e.*, the respondent said, "I don't know the answer to this question, even though the question applies to my situation.")

-1: Not applicable (*i.e.*, the respondent said, "This question does not apply to me.")

II. ACTUAL COMPARISON DATA

#2. How many of the attorneys in your firm currently practice bankruptcy law?

	none	1–5	> 5	Total
1st mailing	2	44	13	59
	(3%)	(75%)	(22%)	
	[1.40]	[43.55]	[14.05]	
2nd mailing	0	18	7	25
	(0%)	(72%)	(28%)	
	[0.60]	[18.45]	[5.95]	
Total	2	62	20	84

$X^2 = 1.126$ df = 2

#7. Of the firm's total creditor representation in the past calendar year, what percentage of the business was "repeat business"?

	-9	-5	0%	1–20%	21–40%	41–60%	61–80%	81–100%	Total
1st mailing	4 (7%) [5.62]	15 (25%) [15.45]	14 (24%) [12.64]	10 (17%) [9.13]	1 (2%) [1.40]	2 (3%) [1.40]	2 (3%) [4.21]	11 (19%) [9.13]	59
2nd mailing	4 (16%) [2.38]	7 (28%) [6.55]	4 (16%) [5.36]	3 (12%) [3.87]	1 (4%) [0.60]	0 (0%) [0.60]	4 (16%) [1.79]	2 (8%) [3.87]	25
Total	8	22	18	13	2	2	6	13	84

$X^2 = 8.813$ df = 7

#8a. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case because current representation of another client created a conflict of interest?

	-9	-1	0%	1–20%	21–40%	Total
1st mailing	5 (8%) [4.92]	17 (29%) [16.86]	28 (47%) [28.10]	8 (14%) [7.73]	1 (2%) [1.40]	59
2nd mailing	2 (8%) [2.08]	7 (28%) [7.14]	12 (48%) [11.90]	3 (12%) [3.27]	1 (4%) [0.60]	25
Total	7	24	40	11	2	84

$X^2 = 0.434$ df = 4

#8b. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case because past representation of another client created a conflict of interest?

	-9	-1	0%	1–20%	Total
1st mailing	5	17	29	8	59
	(8%)	(29%)	(49%)	(14%)	
	[4.92]	[16.86]	[28.10]	[9.13]	
2nd mailing	2	7	11	5	25
	(8%)	(28%)	(44%)	(20%)	
	[2.08]	[7.14]	[11.90]	[3.87]	
Total	7	24	40	13	84

$X^2 = 0.577$ df = 3

#9. How many attorneys in your firm currently practice bankruptcy law? (Results below are for those firms reporting having attorneys currently practicing bankruptcy law.)

1st mailing	avg. = 13	st. dev. = 13.12	n = 13 (22%)
2nd mailing	avg. = 14.92	st. dev. = 8.50	n = 6 (24%)

#10. What percentage of the total work hours of your firm was spent practicing bankruptcy law in the past calendar year?

	-9	-5	-1	1–20%	21–40%	Total
1st mailing	0	2	46	9	2	59
	(0%)	(3%)	(78%)	(15%)	(3%)	
	[0.70]	[2.11]	[44.95]	[9.13]	[2.11]	
2nd mailing	1	1	18	4	1	25
	(4%)	(4%)	(72%)	(16%)	(4%)	
	[0.30]	[0.89]	[19.05]	[3.87]	[0.89]	
Total	1	3	64	13	3	84

$X^2 = 2.485$ df = 4

#11a. What percentage of your firm's bankruptcy practice was spent on Debtor cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–9%	10–29%	30–49%	50%	Total
1st mailing	2	46	2	6	2	1	59
	(3%)	(78%)	(3%)	(10%)	(3%)	(2%)	
	[2.81]	[44.95]	[1.40]	[4.92]	[3.51]	[1.40]	
2nd mailing	2	18	0	1	3	1	25
	(8%)	(72%)	(0%)	(4%)	(12%)	(4%)	
	[1.19]	[19.05]	[0.60]	[2.08]	[1.49]	[0.60]	
Total	4	64	2	7	5	2	84

$X^2 = 5.094$ df = 5

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 22.73%	st. dev. = 20.29%	n = 11 (19%)
2nd mailing	avg. = 32.00%	st. dev. = 14.40%	n = 5 (20%)

#11b. What percentage of your firm's bankruptcy practice was spent on Creditor cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–9%	10–29%	30–49%	50%	Total
1st mailing	2	46	2	2	1	6	59
	(3%)	(78%)	(3%)	(3%)	(2%)	(10%)	
	[2.81]	[44.95]	[1.40]	[1.40]	[4.21]	[4.21]	
2nd mailing	2	18	0	0	5	0	25
	(8%)	(72%)	(0%)	(0%)	(20%)	(0%)	
	[1.19]	[19.05]	[0.60]	[0.60]	[1.79]	[1.79]	
Total	4	64	2	2	6	6	84

$X^2 = 13.34$ df = 5

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 45.45%	st. dev. = 29.61%	n = 11 (19%)
2nd mailing	avg. = 35.00%	st. dev. = 5.00%	n = 5 (20%)

#11c. What percentage of your firm's bankruptcy practice was spent on Creditors' Committee cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–10%	11–30%	Total
1st mailing	3	46	6	4	59
	(5%)	(78%)	(10%)	(7%)	
	[3.51]	[44.95]	[6.32]	[4.21]	
2nd mailing	2	18	3	2	25
	(8%)	(72%)	(12%)	(8%)	
	[1.49]	[19.05]	[2.68]	[1.79]	
Total	5	64	9	6	84

$X^2 = 0.424$ df = 3

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 9.30%	st. dev. = 7.78%	n = 10 (17%)
2nd mailing	avg. = 15.00%	st. dev. = 8.66%	n = 5 (20%)

#11d. What percentage of your firm's bankruptcy practice was spent on Trustee cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–10%	11–30%	Total
1st mailing	2	46	8	3	59
	(3%)	(78%)	(14%)	(5%)	
	[2.81]	[44.95]	[8.43]	[2.81]	
2nd mailing	2	18	4	1	25
	(8%)	(72%)	(16%)	(4%)	
	[1.19]	[19.05]	[3.57]	[1.19]	
Total	4	64	12	4	84

$X^2 = 0.982$ df = 3

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 7.09%	st. dev. = 8.76%	n = 11 (19%)
2nd mailing	avg. = 10.00%	st. dev. = 11.73%	n = 5 (20%)

#11e. What percentage of your firm's bankruptcy practice was spent on Third Party cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–10%	11–30%	Total
1st mailing	2	46	9	2	59
	(3%)	(78%)	(15%)	(3%)	
	[2.81]	[44.95]	[9.83]	[1.40]	
2nd mailing	2	18	5	0	25
	(8%)	(72%)	(20%)	(0%)	
	[1.19]	[19.05]	[4.17]	[0.60]	
Total	4	64	14	2	84

$X^2 = 1.95$ df = 3

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 4.73%	st. dev. = 6.69%	n = 11 (19%)
2nd mailing	avg. = 4.00%	st. dev. = 4.18%	n = 5 (20%)

#11f. What percentage of your firm's bankruptcy practice was spent on Other cases in the past calendar year (AS A PERCENTAGE OF TOTAL WORK HOURS SPENT PRACTICING BANKRUPTCY LAW)?

	-5	-1	0–10%	11–50%	Total
1st mailing	2	46	8	3	59
	(3%)	(78%)	(14%)	(5%)	
	[2.81]	[44.95]	[9.13]	[2.11]	
2nd mailing	2	18	5	0	25
	(8%)	(72%)	(20%)	(0%)	
	[1.19]	[19.05]	[3.87]	[0.89]	
Total	4	64	13	3	84

$X^2 = 2.608$ df = 3

For those firms that gave a percentage, the average and standard deviations are as follows:

1st mailing	avg. = 9.27%	st. dev. = 13.59%	n = 11 (19%)
2nd mailing	avg. = 4.00%	st. dev. = 4.18%	n = 5 (20%)

#13. Of the firm's total creditor representation in the past calendar year, what percentage of the business was "repeat business"?

	-9	-5	1–20%	21–40%	41–60%	61–80%	81–100%	Total
1st mailing	2	46	2	2	4	1	2	59
	(3%)	(78%)	(3%)	(3%)	(7%)	(2%)	(3%)	
	[2.81]	[44.95]	[1.40]	[1.40]	[4.92]	[2.11]	[1.40]	
2nd mailing	2	18	0	0	3	2	0	25
	(8%)	(72%)	(0%)	(0%)	(12%)	(8%)	(0%)	
	[1.19]	[19.05]	[0.60]	[0.60]	[2.08]	[0.89]	[0.60]	
Total	4	64	2	2	7	3	2	84

$X^2 = 5.937$ df = 6

#14a. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case because current representation of another client created a conflict of interest?

	-9	-5	-1	1–20%	21–40%	Total
1st mailing	1	2	46	7	3	59
	(2%)	(3%)	(78%)	(12%)	(5%)	
	[1.40]	[2.81]	[44.95]	[7.73]	[2.11]	
2nd mailing	1	2	18	4	0	25
	(4%)	(8%)	(72%)	(16%)	(0%)	
	[0.60]	[1.19]	[19.05]	[3.27]	[0.89]	
Total	2	4	64	11	3	84

$X^2 = 2.758$ df = 4

#14b. As a percentage of potential bankruptcy business in the past calendar year, how often was the firm unable to represent a creditor client in a bankruptcy case because past representation of another client created a conflict of interest?

	-9	-5	-1	0%	1–20%	21–40%	Total
1st mailing	1	2	46	3	6	1	59
	(2%)	(3%)	(78%)	(5%)	(10%)	(2%)	
	[1.40]	[2.81]	[44.95]	[2.81]	[6.32]	[0.70]	
2nd mailing	1	2	18	1	3	0	25
	(4%)	(8%)	(72%)	(4%)	(12%)	(0%)	
	[0.60]	[1.19]	[19.05]	[1.19]	[2.68]	[0.30]	
Total	2	4	64	4	9	1	84

$X^2 = 1.78$ df = 5

As Professor Stasny explained to me in her analysis of our data, the above comparisons suggest that there is little difference between those firms that responded to the initial mailing of the survey and those that responded after the second mailing. The single instance that raised any concern is question #11b. Firms responding to the first mailing reported somewhat higher percentages than did firms responding to the second mailing (six firms in the former group reported between 60% and 80%, but no firm in the later group reported more than 40%).

There were 61 firms that did not respond to the survey at all. In many surveys, differences between respondents and nonrespondents can severely bias the results of the study. This is of particular concern in studies such as this where the nonresponse rate, 42%, is quite high. The similarities in responses to the first and second mailings in our survey suggest that the reason for a firm's decision to return or not return the first mailing was not strongly related to that firm's substantive responses. The hope is that the same logic applies to those firms that never responded to the survey. That is, we hope that survey responses for the nonresponding firms would be similar to those of the responding firms and that the nonresponses did not seriously bias the results of the study.